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No. 09-1172

IN THE

Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition only serves to confirm that certiorari should be granted. First, three circuit court decisions stand in direct conflict with the decision below, and the government's attempt to distinguish these cases is entirely without merit. Second, the government does not even try to defend the Federal Circuit's perplexing, circular and self-contradicting logic; instead, the government suggests that it too might seek certiorari after a remand. And third, the government hardly disputes that this case fits squarely within the set of cases in which interlocutory review is necessary.

1. Despite its effort, the government cannot obscure the simple and unmistakable conflict be-

tween the Federal Circuit's decision and the holdings of the First, Sixth and Eleventh Circuits.

Contrary to the decision below, the First Circuit applies the class action tolling rule to administrative exhaustion periods, *McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091-92 (1st Cir. 1987); the Sixth Circuit applies the class action tolling rule to "the thirty day limitations period for filing individual administrative complaints," *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988); and the Eleventh Circuit applies the class action tolling rule "'to the filing of administrative claims,'" *Griffin* v. *Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Sharpe* v. *Am. Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)). All three Circuits recognize that "the principles discussed [in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 353-54 (1983) and *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974)] are generally applicable" to administrative filing periods, *McDonald*, 834 F.2d at 1092. *See also Griffin*, 17 F.3d at 360 ("'[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits'" and "'avoid encouraging all putative class members to file separate claims'") (alteration in original) (quoting *Sharpe*, 689 F. Supp. at 300); *Andrews*, 851 F.2d at 150 ("So long as a class action is pending the employer-agency is on notice of the claims of all putative class members.").

a. In denying the existence of this clear conflict, the government's only answer is to assert a false distinction. The government contends that the claimant in each of the other circuit cases could have been a member of the class had a class been certified, while here Petitioner could not have been. But the only asserted reason why Petitioner could not have

been a member of the class is that Petitioner did not "[c]ompl[y] with the six-year presentment requirement" (Opp. 8). In other words, according to the government, there can be no tolling of the presentment requirement because Petitioner did not satisfy the untolled presentment requirement. That gets the analysis completely backwards. And it only begs the question presented, for if routine class action tolling *does* apply, as all of the other Circuits and district courts to speak to the issue have held, then Petitioner did not fail to comply with the statutory timing requirement.

In the end, the government's analysis is entirely circular: the government contends that timely presentment of Petitioner's claims cannot be tolled because Petitioner could not be a member of the certified class, but Petitioner could not be a member of the certified class because it did not timely present. As the government sees it, tolling the time to present administrative claims is permitted only if the claims have already been timely presented—when tolling is plainly unnecessary. That proposition simply collapses of its own weight; it provides no basis for distinguishing the law of the First, Sixth and Eleventh Circuits, and it effectively reads class action tolling out of the law in government litigation.

b. More to the point, under this Court's precedents the question is not whether Petitioner would have been a member of a class had one been certified, but rather whether Petitioner was "'an asserted member'" of the "'putative class,'" which was ultimately not certified in *Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001). Pet. 6, 10 (quoting *Crown*, 462 U.S. at 353-54 and *American Pipe*, 414 U.S. at 554). Here, Petitioner was a member of the asserted class in *Zuni*, which was

comprised of "'all tribes and tribal organizations contracting with [the Indian Health Service] under the [Indian Self-Determination Act] between the years 1993 to the present'" (J.A. 477). And there is no dispute that Petitioner *did* contract with IHS during the asserted class period (*i.e.*, 1996-1998). The government's argument about Petitioner's class status therefore completely misses the mark.

c. It is no response to say that administrative presentment under § 605(a) of the Contract Disputes Act, 41 U.S.C. §§ 610-613 (CDA), is "jurisdictional," while the administrative filings at issue in two of the other three Circuit cases were not. First, the Federal Circuit expressly "reject[ed]" the government's argument and held that CDA presentment is *not jurisdictional*. Pet. App. 12a. The court below observed that its prior decision in *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000) "closes the door" on the argument that section 605(a) "is a 'jurisdictional statute [that is] not subject to judge-made class action tolling.'" Pet. App. 10a (alteration in original). *See also Bowles* v. *Russell*, 551 U.S. 205, 210, 214 (2007) (distinguishing between "jurisdictional rules" for which there can be no "equitable exceptions," and "claims-processing rules").

Second, the premise is wrong because even an indisputably "jurisdictional" statute of limitations, like the deadline to file suit under the Tucker Act, 28 U.S.C. § 1491(a)(1), *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), is nonetheless subject to class action tolling. *Bright* v. *United States*, 603 F.3d 1273 (Fed. Cir. 2010).

In sum, the government is wrong in its contention that the CDA presentment period is jurisdictional; wrong in its view that only jurisdictional statutes are subject to class action tolling; and wrong in its effort

to distinguish the decisions of the other three Circuits.

d. The government's policy reason for distinguishing between class action tolling of the CDA's presentment period and class action tolling of other administrative filing requirements is equally unavailing. Class action tolling under *American Pipe* and *Crown* is intended to promote efficiency while "'notif[ying] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *Crown*, 462 U.S. at 353.

Here the agency was well aware of all the potential class claims being asserted against it for unpaid contract support costs, even in the absence of formal "presentment" of such claims by each of the asserted class members. Pursuant to a statutory mandate, 25 U.S.C. § 450j-1(c)(2), the government regularly developed annual reports to Congress setting forth "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors," *id.*, identifying each and every contractor that was underpaid and precisely by how much. Particularly in this setting, and as *Crown* notes, 462 U.S. at 353, the filing of a class action complaint easily satisfies the government's asserted interest in some notice (Opp. 11-12). The government's demand for even more notice is, at bottom, an attack on class action tolling in general and a demand for the individualized presentment that the First, Sixth and Eleventh Circuits uniformly reject.

The government also asserts that individualized presentment is compelled by the government's need for an opportunity to explore individualized settlement (Opp. 12), but that too is nothing more than an

attack on class action tolling. Moreover, in both the *Zuni* and *Ramah* class actions, as here and as in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), the plaintiffs raised not an individualized claim but a challenge to a categorical agency position, set in concrete in an agency circular, that a statutory exception contained in the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, excused the agency from paying any additional contract support costs. By its very nature, a claim against an agency circular or regulation is not amenable to individualized settlement by contracting officers. So there exist no compelling policy reasons to support the Federal Circuit's sharp departure from the law of the other Circuits.

2. Turning to the merits, even the government distances itself from the Federal Circuit's reasoning. Most tellingly, the government offers no rationale to explain why Congress would choose to prohibit predictable class action tolling but nonetheless permit discretionary equitable tolling. Both class action tolling and equitable tolling are creatures of congressional intent, *see* Pet. 13 (discussing *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (equitable tolling) and *American Pipe*, 414 U.S. at 557-58) (class tolling)), and there is simply no reason to believe that Congress intended the implausible result reached by the Federal Circuit.

Understandably, the government does not defend this bizarre formulation. Rather, it expressly reserves the right to petition this Court to review the Federal Circuit's decision if it loses the equitable tolling issue on remand. Opp. 6 n.1. The best that can be said, then, is that *no one* defends the logic of the Federal Circuit's split-the-baby resolution of the tolling issues. The Federal Circuit's approach is

based on the fundamentally illogical proposition that the CDA presentment period is, at one and the same time, both jurisdictional and non-jurisdictional. No remand will cure this flawed analysis and the government makes no effort to defend it, providing another compelling reason why the Petition should be granted.

3. The interlocutory posture of this case is no reason to delay review because the decision below is plainly wrong and will immediately generate needless litigation and administrative proceedings.

The government's protestation notwithstanding (Opp. 6-7), "'there is no absolute bar to review of nonfinal judgments.'" Pet. 13-14 (quoting *Mazurek* v. *Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam)). This Court has intervened when a lower court decision is "'patently incorrect'" and will have "'immediate consequences.'" Pet. 14 (quoting Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007)).

The government does not and cannot dispute that this case fits squarely within these criteria. As noted, the government does little to defend the logic of the Federal Circuit's decision and even suggests that it, too, may seek review of the Circuit's decision following remand. Opp. 6 n.1. The decision is illogical, internally inconsistent, and "patently incorrect." Gressman et al., *supra*, at 281.

Moreover, if this Court does not grant review to enforce the mandatory tolling rule, the consequence will be time-consuming, case-by-case, litigation by scores of individual claimants attempting to prove their fact-bound claims for equitable tolling—litigation that could drag on for years. Needless to say, this would burden not just Petitioner and

potentially every other tribal contractor that was unlawfully underpaid under this Court's *Cherokee* decision, but also the Board and the Federal Circuit. Such "immediate consequences" provide ample justification for stepping in now to reconcile the conflicting Circuits' decisions and to correct a fundamental misapplication of this Court's class action jurisprudence.

The burden of deferring review until some later time is exacerbated because virtually all suits against the government (other than Tucker Act litigation) require some sort of administrative exhaustion. *See* Pet. 13-14. By excepting administrative exhaustion from the class action tolling rule, the Federal Circuit's decision severely narrows the availability of class action litigation against the government, directly contrary to *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979). As a result, similarly situated parties will be required needlessly to file separate but duplicative administrative proceedings before the Board and other agencies, as well as pursue separate federal court review—negating the very efficiencies the class action mechanism is meant to provide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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